IN THE

Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 493.

ROY OLMSTEAD, JERRY L. FINCH, CLARENCE G. HEALY, CLIFF MAURICE, TOM NAKAGAWA, EDWARD ENGDAHL, MYER BERG, JOHN EARL AND FRANCES RICHARD BROWN, PETITIONERS,

vs.

UNITED STATES OF AMERICA.

No. 532.

CHARLES S. GREEN, EMORY A. KERN, Z. J. HEDRICK, EDWARD ERICKSON, WILLIAM P. SMITH, DAVID TROTSKY, LOUIS O. GILLIAM, CLYDE THOMPSON AND BERNARD WARD, PETITIONERS,

vs.

UNITED STATES OF AMERICA.

No. 533.

EDWARD H. MCINNIS, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief of Petitioners Edward H. McInnis, Charles S. Green, Emory A. Kern, Z. J. Hedrick, Edward Erickson, William P. Smith.

Opinions of the Lower Courts.

Three opinions were rendered by the District Court. On the first [illegible] to strike [illegible] (R. 102; 7 F. (2d) 736) the second [illegible] (R. 123; 21 F. (2d) 712) and the third [illegible] (R. 223; 7 F. (2d) 760). The opinions of the Circuit Court of Appeals (R. 237, 332 and 341) are reported in 19 F. (2d) at pages 842 and 843 respectively and dissenting opinion in F. (2d) 848.

Jurisdiction.

Judgment of the United States Circuit Court of Appeals for the Ninth Circuit was entered on May 9, 1927. (R. 236.) A petition for rehearing was filed September 9, 1927, and denied November 28, 1927. A petition for rehearing en banc was also filed September 9, 1927, and denied December 17, 1927, and granted January 9, 1928. Jurisdiction is conferred by section [illegible] and it is urged that the judgment of the court below is reviewable upon writ of certiorari under section [illegible] of the Judicial Code as amended by the Act of February 13, 1925.

The claims of error and the rulings made in the lower courts which are relied upon as the basis for this court's jurisdiction are: That the admission of evidence on a motion to suppress over the objections of the defendants of the testimony of Federal officers as to telephone conversations between the defendants and overheard by such Federal officers over the private telephone lines of the defendants tapped by the Federal officers is a violation of the rights guaranteed the defendants by the Fourth and Fifth Amendments to the Constitution of the United States. (R. 281, 282, 294, 324, 332, 392.)

Statement of the Case.

In allowing the writ of certiorari this court limited its review to the question above set forth. It is unnecessary, therefore, to give a detailed statement of the evidence disclosed by the record. The facts sufficient for the understanding of the question involved may be briefly stated as follows. The petitioners were indicted with about eighty other defendants for conspiracy (Sec. 37 Penal Code) to violate the National Prohibition Act (Act of October 28, 1919). The principal evidence offered against the defendants was given by Federal Prohibition Agents relating to alleged conversations learned by them over telephone lines tapped by the defendants. By means of tapping the defendants' telephone lines, (Most of the wire tapping, if not all, was done by Federal Prohibition Agent Richard Bryant pursuant to instructions of Assistant Prohibition Administrator William Whittier. For a period of several weeks certain agents listened in over the tapped wires and made notes of the conversations overheard and later revised and extended these notes. These notes were turned over to Mrs. Whittney, wife of the presiding agent, and were typewritten. They were again revised by the agents as well as by Mr. Whittney himself, and were again rewritten. Both the first and secondary notes were destroyed.) All the evidence relating to the conversations heard by the government agents over the tapped telephone wires was admitted by the trial court over the repeated objections of the defendants that such evidence was obtained in violation of the constitutional rights of the defendants under the Fourth and Fifth Amendments to the Constitution.

Error.

In view of the limited review granted by this court upon the writ of certiorari the only error to be assigned for consideration is the admission of evidence over the defendants' objections of alleged telephone conversations heard by government agents over the private telephone

lines of the defendants by means of secretly tapping such wires in violation of the rights of the defendants under the Fourth and Fifth Amendments.

ARGUMENT.

Federal agents secretly tapped the private telephone lines of the defendants, intercepted the private messages and conversations of the defendants, and were permitted, over the objections of defendants, to testify concerning such messages and conversations. The sole question presented here is whether the obtaining of evidence in this manner is a violation of the rights guaranteed under the Fourth and Fifth Amendments to the Constitution of the United States. This question does not appear to have been heretofore considered by this court or any other court of record. Since it is a question of first impression it is necessary to consider the facts of this case in the light of the expressions of this Honorable Court upon the general question of searches and seizures prohibited by the Fourth and Fifth Amendments.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated.

The provisions of the Fifth Amendment here involved are:

> No person . . . shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without due process of law.

This Court has held that these two amendments were inspired by the same abuses preceding the adoption of the Constitution, and that they must be liberally construed in favor of the citizen and his liberty, and that stealthy en-

encachments upon the rights guaranteed by them will not be tolerated. (Boyd vs. United States, 116 U. S. 616.)

The majority opinion of the Circuit Court of Appeals for the Ninth Circuit places a narrow construction upon the rights protected by these amendments, declaring that "the purpose of the amendments is to prevent the invasion of homes and offices and seizure of incriminating evidence found therein." The majority opinion of the Court concedes that the tapping of the defendants' telephone wires is an "*unethical intrusion on the privacies of persons* who are suspected of crime," but holds that "*it is not an act which comes within the letter of the prohibition of constitutional provisions.*" (R. 560.)

The foregoing declarations of the Circuit Court are directly contrary to the holdings of this Court. In *Ex Parte* Jackson, 96 U. S. 727, this Court did not limit the applications of the amendments to the "*invasion of homes and offices.*" Neither has this court limited the application of these amendments to the "letter" of the same. On the contrary, the underlying thought in each decision of this court effecting these amendments has been to apply the "spirit" of the same. In the *Boyd* case this Court declares that these principles apply to all invasions on the part of the Government and its employes of the security of a man's home *and the privacies of life.*

The conception of this Court as to the protection afforded the citizen by the Fourth and Fifth Amendments is fully and clearly defined in the case of Boyd vs. United States, supra, a careful analysis of which case shows that in fact no search and no seizure were involved if the words "search and seizure" be given their literal meaning. In that case, which involved the forfeiture of certain goods alleged to have been imported in violation of the customs laws, the court issued a notice to the claimants of said goods requiring the claimants to produce a certain invoice of a previous importation. This notice was issued pursuant to an act of Congress which authorized the issuance of the same upon motion of the Government attorney, and the penalty pro-

scribed by the act of Congress for non-compliance with the notice was that the allegations of the Government attorney as to that which the invoice or paper contained would be taken as confessed. Boyd produced the paper under protest and the court held that the right of the claimants under the Fourth and Fifth Amendments had been violated.

It is apparent that no search was involved or contemplated in that case. It is also apparent that no actual seizure was involved, as the claimant was not required to part with the possession and custody of the paper, but was only required to produce it in court for inspection. The Court in its decision admitted in effect that no actual search and no actual seizure were involved, but held that the result was the same as if an actual search and an actual seizure were made. In this connection the Court said:

> But in regard to the Fourth Amendment it is contended that whatever might have been alleged against the constitutionality of the Acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so, but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production, for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating accidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting . . . but it accomplishes the substantial object of those acts in forcing from the party evidence against himself. It is our opinion, therefore, that the compulsory seizure of a man's private papers to establish a crime charged against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution; in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure. (Italics ours.)

By the foregoing language this Court definitely established that it is not the mere form and substance of the acts of government agents which determines whether the search and seizure are in violation of the constitutional provisions, but it is the results accomplished by such acts. If such acts effect the sole object and purpose of search and seizure then they come within the inhibition of the Fourth and Fifth Amendments.

In the case at bar, the sole object of the government agents was to obtain evidence relating to transactions in liquor by the defendants. The conversations heard over the telephone was of evidential value only. It is no crime to exchange messages relating to the possession and sale of liquor. The crime is to possess and sell liquor, and conversations concerning the possession or sale are only admissible when the liquor which is possessed or sold is seized. Suppose that the messages relating to the possession and sale of the liquor had been sent by letter. No warrant to search the homes, offices or persons of the defendants for such letter could have been obtained. Gouled vs. United States, 255 U. S. 298, 300. Likewise, no valid search warrant could be obtained by government agents to tap the telephone lines of the defendants for the purpose of securing evidence of the private messages and conversations relating to the possession or sale of liquor. Such messages, whether transmitted by letter or telephone, are of evidential value only, and lawful searches for such evidence can not be made under the decision in the Gouled case. However, to again quote the language of the Boyd case, the sole object and purpose of search and seizure were effected as completely by tapping the wires, listening to the messages and testifying to them, as if the government agents had entered the homes of the defendants and seized letters or papers containing exactly the same messages.

Furthermore, the admission of the evidence of government agents as to the messages transmitted over the telephone wires compelled the defendants to give evidence against themselves just as effectively as if they had been

forced to take the witness stand and themselves testify as to the messages sent over the telephone; yea, just as effectively as if the defendants had been required to produce in court private messages sent by letter of exactly the same import as the messages sent by phone. The result is to compel the defendants to become the unwilling source of evidence to convict them of crime which the court in the *Boyd* case held to be a violation of the defendants' rights under the Fifth Amendment.

In declaring the underlying principles of the Fourth and Fifth Amendment this Court has constantly kept in mind the causes for their adoption. In Byers vs. United States, ... U. S. ..., the court states:

> "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies, and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

Again, in the case of Boyd vs. United States, supra, the court recites the historical facts leading up to the adoption of these amendments and declares that the opinion of Lord Camden must have been considered by the framers of the two amendments "as sufficiently explanatory of what was meant by unreasonable search and seizure." The invasions prohibited by the Fourth and Fifth Amendments are defined by the court as follows:

> "The principles laid down in this opinion (referring to Lord Camden's opinion) affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the Court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employees of the security of a man's home *and the privacies of life*. It is not the breaking of his doors and the rummaging of his

drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible *right of personal security*, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense—*it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.* Breaking into a house and opening boxes and drawers are circumstances of aggravation; but *any forcible and compulsory extortion of a man's own testimony* or of his private papers *to be used as evidence to convict him of crime* or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." (Italics ours.)

What constitutes "an invasion of the privacies of life" within the meaning of the foregoing language of this court? It would indeed be difficult to attempt to enumerate all of those things coming within the phrase "the privacies of life," but it would be equally difficult to suggest any more sacred or any greater *privacy of life* under present conditions than that of using a private telephone line for transmitting private and confidential communications to one's family and business associates. What greater invasion of this privacy of life could be contemplated than to have one's private and confidential communications intercepted and overheard by promiscuous government agents by means of secretly tapping one's telephone? The telephone as a means of communication was not known to the world at the time of Lord Camden's judgment, or at the time of the adoption of the Fourth and Fifth Amendments, or even at the time of the decision of this Court in the *Boyd* case. The only means of communication at that time was by letter, and the right to transmit a secret message in a letter without having the same intercepted and read by government agents was declared by this Court in no uncertain language in the case of Ex Parte Jackson. The application of this case to the

present inquiry was pointed out by Justice Rudkin in his dissenting opinion in the following language:

> "In discussing the protection that surrounds a letter deposited in the mail in *Ex parte* Jackson, 96 U. S. 727, 733, Mr. Justice Field said:
>
> "'Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers thus closed against inspection wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.
>
> "And, it is the contents of the letter, not the mere paper that is thus protected. What is the distinction between a message sent by letter and a message sent by telegraph or by telephone? True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed and the other unsealed, but these are distinctions without a difference. A person using the telegraph or telephone is not broadcasting to the world. His conversation is sealed from the public as completely as the nature of the instrumentalities employed will permit, and no federal officer or federal agent has a right to take his message from the wires in order that it may be used against him. Such a situation would be deplorable and intolerable to say the least. Must the millions of people who use the telephone every day for lawful purposes have their messages inter-

> rupted and intercepted in this way? Must their personal, private and confidential communication to family, friends and business associates pass through any such scrutiny on the part of agents, in whose selection they have no choice, and for the faithful performance of whose duties they have no security? Agents, whose very names and official stations are in many instances concealed and kept from them. If ills such as these must be borne, our forefathers signally failed in their desire to ordain and establish a Government to secure the blessings of liberty to themselves and their posterity."

As pointed out by Judge Rodkin in the foregoing language it is not the paper which is protected by the constitutional inhibitions against unreasonable searches and seizures, but it is the message contained in the letter. In the same manner any message transmitted by telephone or telegraph should be protected. The interpretation of the language of the Fourth and Fifth Amendments should be sufficiently liberal and elastic to apply the principles laid down by the Court in the *Boyd* case to the conditions existing under the advancement in social and business intercourse as affected by modern inventions. That this is the true criterion is declared by the Court in Village of Euclid vs. Nedder Realty Co., 272 U. S. 365 as follows:

> "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise."

The telephones used by the defendants were theirs against all the world, even against the telephone company while their tolls were paid. The telephone lines leading to the defendants' houses and offices, as well as the telephone equipment in the houses and offices, were the private property of the defendants. They had the right to the exclusive use and enjoyment of same, except the license given by them to

connect other lines with their lines for the purpose of receiving incoming calls. When the government agents tapped the defendants' telephone lines they committed a trespass upon the property rights of the defendants. The effect of this trespass was to project themselves into the houses and offices of the defendants with the same result as if they had broken through the window or door of the defendants houses and secretly seized a letter containing the identical message that was transmitted over the phone. The result was not only an unlawful search for evidence but an unlawful seizure by means of which the defendants, in effect, were compelled to testify against themselves. As stated by Judge Rudkin, those who use the telephone are not broadcasting to the world. Under modern conditions the telephone has, to a large extent, supplanted the mails as a means of transmitting private messages. It has become indispensable to every home and office. If the stamp of approval is put upon the action of Government agents in seeking and obtaining evidence against those suspected of crime by means of tapping private telephone lines, the door is opened wide for the great mass of citizens using the telephone for lawful purposes to have their private and confidential communications relating to business and family, subjected to the scrutiny of government agents. Such a system of espionage would become unbearable and deplorable. It would deprive the citizenship of the country of the personal security and the enjoyment of the privacies of life guaranteed by the Constitution, and subject them to an espionage unequalled by the conditions prevailing under the King's officers prior to the Revolution.

Respectfully submitted,

FRANK R. JEFFERY,

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Seattle, Washington.

Nos. 493, 532, and 533

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v.

UNITED STATES OF AMERICA

CHARLES S. GREEN, EMORY A. KERN, E. J. HEDRICK, EDWARD ERICKSON, WILLIAM P. SMITH, DAVID TROTSKY, LOUIS O. GILLIAM, CLYDE THOMPSON AND BERNARD WARD, *Petitioners*

v.

UNITED STATES OF AMERICA

EDWARD H. McINNIS, *Petitioner*

v.

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITIONERS' CONTENTION.

Filed by leave of court by the undersigned counsel, amici curiae, in behalf of The Pacific Telephone and Telegraph Company, American Telephone and Telegraph Company, United States Independent Telephone Association and Tri-State Telephone and Telegraph Company

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OTTO B. BUPP
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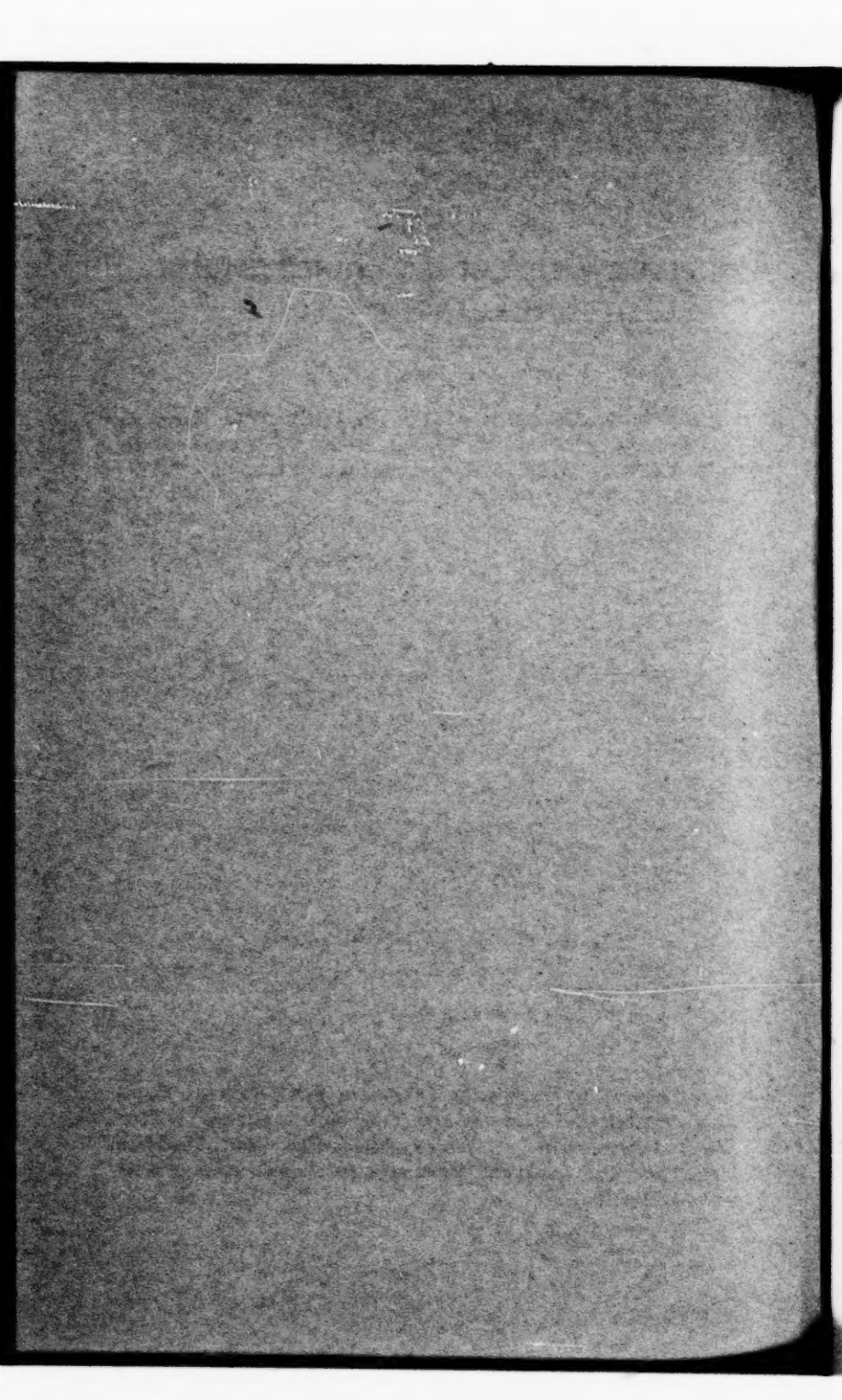

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UNITED STATES OF AMERICA

No. 533

EDWARD H. McINNIS, *Petitioner*

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UNITED STATES OF AMERICA

Motion of counsel for The Pacific Telephone and Telegraph Company, American Telephone and Telegraph Company, United States Independent Telephone Association, and Tri-State Telephone and Telegraph Company, for leave to file a brief as amici curiae

Now come Otto B. Rupp, Counsel for The Pacific Telephone and Telegraph Company, Charles M. Bracelen and Robert H. Strahan, Counsel for American Telephone and Telegraph Company, and Clarence B. Randall, Counsel for United States Independent Telephone Association and Tri-State Telephone and Telegraph Company, and respectfully move for leave to file a brief in the above entitled causes, as *amici curiae*, in support of the contention of petitioners.

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No. 533

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v.

UNITED STATES OF AMERICA

BRIEF OF COUNSEL, AMICI CURIAE, FILED BY LEAVE OF COURT, IN BEHALF OF THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, THE UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, IN SUPPORT OF THE PETITIONERS' CONTENTION.

Federal prohibition agents secretly tapped the telephone lines of petitioners, and overheard and made a written record of private conversations between them, which were received in evidence and led to the indictment and conviction of petitioners for conspiring to violate the National Prohibition Act. The petitioners claimed the protection of the Fourth and Fifth Amendments, and this court has granted certiorari to review the action of the district and circuit courts in receiving the evidence.

In its order granting the petitions for certiorari this court has limited its consideration to the question—

> "Whether the use of evidence of private telephone conversations, between the defendants and others, intercepted by means of wire tapping, is a violation of the Fourth and Fifth Amendments and, therefore, not permissible in the federal courts."

In view of the able briefs filed by counsel for the parties, we limit our discussion to the following suggestions.

Argument.

It is said that there is no precedent to support the petitioners' contention. That there is no authoritative case on all fours, nor any case that in its adventitious circumstances closely resembles the facts of this case, is true. There is, however, more in the opinions of courts than their bare recital of facts, and the decision of the cases. The grounds of decision, the statement and exposition of the enduring principles of law which they set forth, are what give them life and vigor and make them valuable as prece-

dents. So regarded the several decisions of this court that are relied upon and discussed in the briefs of counsel for the petitioners are believed to be in point and to sustain their contention.

Ex parte Jackson, 96 U. S. 727;
Boyd v. *United States*, 116 U. S. 616;
Weeks v. *United States*, 232 U. S. 383;
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385;
Gouled v. *United States*, 255 U. S. 298;
Agnello v. *United States*, 269 U. S. 20;
Byars v. *United States*, 273 U. S. 28.

In these cases the court has held that the Fourth and Fifth Amendments are designed to protect the people in the privacies of life, and in the indefeasible, sacred right of personal security and personal liberty (the *Boyd*, *Weeks* and other cases). The invasion of these rights secretly and by stealth is within the condemnation of these amendments, no less than invasion accomplished by force (*Gouled* case). It is not necessary, in order to constitute a violation of the Fourth Amendment, that there be any entry into the house or office of the person, (*Ex parte Jackson*) or that there be a "search" or a "seizure" in any exact or literal sense of the words, (the *Boyd* case; see also *Perlman* v. *U. S.*, 247 U. S. 7). And evidence secured by federal agents in ways that violate the Fourth Amendment is inadmissible under the Fifth Amendment.

The petitioners were using the telephone lines and facilities of the local telephone company, such as were available to everyone without discrimination. *The function of a telephone system in our modern economy is, so far as*

reasonably practicable, to enable any two persons at a distance to converse privately with each other as they might do if both were personally present in the privacy of the home or office of either one. When the lines of two "parties" are connected at the central office, they are intended to be devoted to the exclusive use, and in that sense to be turned over to the exclusive possession, of the parties. A third person who taps the lines violates the property rights of both persons then using the telephone, and of the telephone company as well. *International News Service* v. *Associated Press*, 248 U. S. 215.

It is of the very nature of the telephone service that it shall be private; and hence it is that wire tapping has been made an offense punishable either as a felony or misdemeanor by the legislatures of twenty eight states, and that in thirty five states there are statutes in some form intended to prevent the disclosure of telephone or telegraph messages, either by connivance with agents of the companies or otherwise.*

The wire tapper destroys this privacy. He invades the "person" of the citizen, and his "house", secretly and without warrant. Having regard to the substance of

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*We append a list of these statutes, Appendix A, in which we include also certain federal statutes.

We do not mean to suggest that the states can by statute destroy or impair any authority federal officers have under the Constitution and laws of the United States, and thus tie the hands of the Federal Government. Our suggestion is that this general and widespread recognition by the states of the privacy of the telephone lends most persuasive support to the contention that it is one of the privacies of life which the Fourth Amendment protects against invasion by the Government of the United States, and that any search which invades the privacy of the telephone is an unreasonable search and therefore violates that amendment.

things, he would not do this more truly if he secreted himself in the home of the citizen.

In view of what this court has held as to the intent and scope of the Fourth and Fifth Amendments, it would not seem necessary to enter into any meticulous examination of their precise words. But if that be done, does not wire tapping involve an "unreasonable search", of the "house" and of the "person"? There is of course no search warrant, as in the nature of the case there could not be. If the agent should secrete himself in the house or office to examine documents, would not that constitute a "search"? Is the case any different in the eyes of the law if from a distance the agent physically enters upon the property of the citizen, as he does when he taps the wire, and from that point projects himself into the house? Certainly in its practical aspect the latter case is worse than the first, because the citizen is utterly helpless to detect the espionage to which he is subjected.

If it be said that, in any event, there is no "seizure", that an oral conversation cannot be seized, we answer, in the first place, that this is a purely superficial view, which puts the letter above the spirit and intent of the law. The "privacy of life" and the liberty of the citizen have been invaded. And, in the second place, we do not understand that seizure is a necessary element to constitute the offense. An unreasonable search alone violates the Fourth Amendment. It is enough that the federal officer has made an unreasonable search, within the meaning of the Fourth Amendment, and has thereby unlawfully *obtained* evidence. The evidence so obtained is excluded under the provisions of the Fifth Amendment.

Suppose the agent, having no search warrant, were to enter a man's home by stealth, and in his absence search for and find there among his papers an incriminating letter written by him, and should merely read the letter and make some such record of its contents as was made of the contents of the communications overheard by these wire tappers. This hypothetical case and the wire tapping case are alike in that (1) the agent was searching for evidence, (2) he gained knowledge of incriminating statements made by the accused, (3) he had no search warrant, (4) he accomplished his purpose by stealth, (5) he made no "seizure" in the literal meaning of the word, and (6) the statements of the accused were extorted from him and used to obtain his conviction of a crime. They are unlike in that (1) one communication is written and the other oral or, if you please, one has been impressed upon paper to be dispatched by mail, and the other has been impressed upon an electric current to be dispatched to its destination by a wire. The Government itself provides the mail service, a public service, and *the Government authorizes the telephone company to provide the telephone service, also a public service.* It is settled that the communication in the mail is protected (*Ex parte Jackson*). Upon what reason, then, can it be said that the communication by telephone is not protected?

The cases are also unlike in that (2) in the hypothetical case the agent in person physically trespasses upon the house and searches with his eyes, while in the wire tapping case he physically trespasses upon the telephone line, which enters the house, and searches with his ears.

As Judge Rudkin states the matter in his vigorous and able dissenting opinion (Record 588, 594):

> "True the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed and the other unsealed, but these are distinctions without a difference. A person using the telegraph or telephone is not broadcasting to the world. His conversation is sealed from the public as completely as the nature of the instruments employed will permit, and no federal officer or federal agent has a right to take his message from the wires in order that it may be used against him."

It will be observed that whenever a telephone line is tapped the privacy of the persons at both ends of the line is invaded, and all conversations between them upon whatever subjects, however proper, confidential and privileged they may be, are overheard. Not only that, but the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. There are in the United States more than eighteen million telephones interconnected in and with the Bell System, so that any one of them can be connected with any other at any time. Daily there are many times that number of telephone conversations over these lines. These figures take no account of the telephone service available to each one of these telephones for communication to Canada, Cuba, Great Britain, continental Europe and Mexico. The telephone has become part and parcel of the social and business intercourse of the people of the United States, and this telephone system offers a

means of espionage compared to which general warrants and writs of assistance were the puniest instruments of tyranny and oppression.

The telephone companies deplore the use of their facilities in furtherance of any criminal or wrongful enterprise. But it was not solicitude for law breakers that caused the people of the United States to ordain the Fourth and Fifth Amendments as part of the Constitution. Criminals will not escape detection and conviction merely because evidence obtained by *tapping wires of a public telephone system* is inadmissible, if it should be so held; but, in any event, it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the government, who will act at their own discretion, the honest and the dishonest, unauthorized and unrestrained by the courts. Legislation making wire tapping a crime will not suffice if the courts nevertheless hold the evidence to be lawful. Writs of assistance might have been abolished by statute, but the people were wise to abolish them by the Bill of Rights.

> "We said in *Boyd* v. *United States*, 116 U. S. 616, 630,—and it cannot be too often repeated,—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of his life. As said by Mr. Justice Field in *In re Pacific Railway Commission*, 32 Fed. Rep. 241, 250 'of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of

his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.' "

Interstate Commerce Commission v. *Brimson*, 154 U. S. 447.

Respectfully submitted,

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APPENDIX A.

State Statutes in effect January 1st, 1928, making wire tapping an offense punishable either as a felony or misdemeanor.

State.	*Reference to Statute.*
Alabama	Code (1923), Sec. 5256.
Arizona	Penal Code, Title 19, Sec. 692.
Arkansas	Crawford & Moses Digest (1921), Chapter 171, Sec. 10246.
California	Penal Code, Sec. 639-40.
†Colorado	Compiled Laws (1921), Sec. 6969.
Connecticut	Gen. Stats. (Rev. of 1918), Sec. 6292.
†Idaho	Compiled Stats. (1919), Sec. 8586.
Illinois	Laws 1927, p. 868, Sec. 1.
Iowa	Code (1927), Sec. 13121.
Kansas	Rev. Stats. (1923), Ch. 17, Sec. 1908.
Michigan	Comp. Laws (1915), Ch. 257, Sec. 15403.
oMinnesota	Gen. Stats. (1923), Ch. 101, Sec. 10433.
†Montana	Penal Code (1921), Sec. 11518.
Nebraska	Comp. Stats. (1922), Ch. 67, Art. III, Sec. 7115.
Nevada	Rev. Laws (1912), Sec. 4632, 6751.
New York	Penal Law, Sec. 1423.
North Dakota	Rev. Codes (1905), Chap. 72, Sec. 9426.
Ohio	Gen. Code, Title I, Ch. 20, Sec. 13402.
Oklahoma	Comp. Stats. (Supp. 1926), Ch. 6, Art. LXI, Sec. 2229.
†Oregon	Laws 1920, Tit. XIX, Sec. 2265.
†Rhode Island	Gen. Laws 1923, Title XXIX, Ch. 397, Sec. 6104.

†Statute refers in terms to telegraphic messages only.
oRefers to *interference* with any telephone instrument or apparatus.

State.	*Reference to Statute.*
South Dakota	Rev. Codes (1919), Ch. 15, Sec. 4312.
Tennessee	Thompson's Shannon's Code (1917), Sec. 1839-40; Laws 1921, Chap. 59, p. 88.
Utah	Comp. Laws (1917), Sec. 8432-33.
Virginia	Gen. Laws (1923), Sec. 4477.
Washington	Remington's Comp. Stats. (1922), Sec. 2656 (18).
Wisconsin	Stats. (1923), Chap. 348, Sec. 4558.
Wyoming	Comp. Stats. (1920), Ch. 452, Sec. 7148.

State Statutes in effect Jan. 1st, 1928, making disclosure of telephone or telegraph messages a penal offense, either through connivance with agents of the telephone or telegraph company, or otherwise.

State.	*Reference to Statute.*
Alabama	Code (1923), Sec. 5256.
Arizona	Penal Code, Sec. 690-1.
Arkansas	Crawford & Moses Digest (1921), Chap. 171, Sec. 10250.
California	*Penal Code, Sec. 619, 641.
†Colorado	Comp. Laws (1921), Sec. 6966, 6970.
Connecticut	Gen. Stats. (Rev. of 1918), Sec. 6292.
Florida	Rev. Gen. Stats. (1920), Sec. 5755.
†Idaho	Comp. Stats. (1919), Sec. 8568.
Illinois	Rev. Stats. (1925), Ch. 134, Sec. 8.
Indiana	*Burns Ann. Stats. 1926, Sec. 2862.
†Louisiana	*Cons. & Stats. (1920), p. 2175.
*Maine	Rev. Stats. (1916), Ch. 60, Sec. 24, p. 991.
Maryland	Ann. Code (1924), Art. 27, Sec. 489.
Michigan	Comp. Laws (1915), Ch. 168, Sec. 8781, Ch. 253, Sec. 15104.

*Statute contains a proviso that message may be divulged under order of a court of justice or other lawful authority.

†Statute refers in terms to telegraphic messages only.

State.	*Reference to Statute.*
Minnesota	Gen. Stats. (1923) Ch. 101, Sec. 10423.
†Mississippi	Hemingway's Ann. Code (1927), Sec. 1174.
Missouri	*Rev. Stats. (1919), Secs. 3605, 10140.
†Montana	Penal Code (1921), Sec. 11194-6.
Nebraska	Comp. Stats. (1922), Ch. 67, Art. II, Sec. 7088.
†Nevada	Rev. Laws (1912), Sec. 4603-5, Sec. 6713.
New Jersey	Comp. Stats., Vol. 4, p. 5319-20, Sec. 12-13.
New York	*Penal Law, Sec. 552.
North Carolina	Cons. Stats. (1919), Art. 46, Sec. 4497.
†North Dakota	*Rev. Codes (1905), Sec. 9343.
Ohio	Gen. Code, Title I, Ch. 20, Sec. 13419.
Oklahoma	Comp. Stats. (Supp. 1926), Ch. 6, Art. LXI, Sec. 2256.
†Oregon	Laws (1920), Title XIX, Secs. 2260, 2266.
Pennsylvania	Pa. Stats. (1921), Sec. 6308, p. 596.
†Rhode Island	Gen. Laws (1923), Title XXXIX, Ch. 397, Sec. 6104.
South Dakota	Rev. Codes (1919), Sec. 4346, Sec. 9801.
Tennessee	Thompson's Shannon's Code (1917), Sec. 1837-38.
Utah	Comp. Laws (1917), Sec. 8403-5, 8434.
Virginia	Gen. Laws (1923), Sec. 4477.
†Washington	Remington's Comp. Stats. (1922), Sec. 2662.
Wisconsin	Stats. (1923), Ch. 348, Sec. 4557-4557a.

*Statute contains a proviso that message may be divulged under order of a court of justice or other lawful authority.

†Statute refers in terms to telegraphic messages only.

Federal Statutes.

Act of Congress passed October 29, 1918 (40 Stat. L. 1017), entitled "An Act providing for the protection of the users of telephone and telegraph service and the property and funds belonging thereto during the Government operation and control," as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whoever during the period of governmental operation of the telephone and telegraph systems of the United States by the Postmaster General, under the Act of Congress approved July sixteenth, nineteen hundred and eighteen, and the proclamation of the President dated July twenty-second, nineteen hundred and eighteen, shall, without authority and without the knowledge and consent of the other users thereof, except as may be necessary for operation of the service, tap any telegraph or telephone line, or wilfully interfere with the operation of such telephone and telegraph systems or with the transmission of any telephone or telegraph message, or with the delivery of any such message, or whoever being employed in any such telephone or telegraph service shall divulge the contents of any such telephone or telegraph message to any person not duly authorized or entitled to receive the same, shall be fined not exceeding $1,000 or imprisoned for not more than one year, or both. * * *"

Federal control of telephone lines terminated on July 31, 1919, pursuant to Act of Congress of July 11, 1919 (41 Stat. L. 137).

Act of Congress passed February 23, 1927 (Radio Act, 44 Stat. L. 1162), as follows:

"* * * SEC. 27. No person receiving or assisting in receiving any radio communication shall divulge or publish the contents, substance, purport, effect, or meaning thereof except through authorized channels of transmission or reception to any person other than the addressee, his agent, or attorney, or to a telephone, telegraph, cable or radio station employed or authorized to forward such radio communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the radio communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person; and no person not being entitled thereto shall receive or assist in receiving any radio communication and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcasted or transmitted by amateurs or others for the use of the general public or relating to ships in distress."

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In the

Supreme Court of the United States

OCTOBER TERM, 1927

No.

ROY OLMSTEAD, JERRY L. FINCH, CLARENCE G. HEALY, CLIFF MAURICE, TOM NAKAGAWA, EDWARD ENGDAHL, MYER BERG, JOHN EARL and FRANCIS RICHARD BROWN,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Upon Certiorari from the United States Circuit Court of Appeals for the Ninth Circuit

Reply Brief of Plaintiffs in Error

SUPPLEMENTAL STATEMENT OF THE CASE

The plaintiffs in error were indicted with others in the United States District Court for the Western District of Washington, Northern Division, January 19th, 1925, for a conspiracy to violate the National Prohibition Act (R. 1-44), and convicted on said charge February 20th, 1926 (R. 250-5; 259-268), and

a writ of error was sued out from the United States Circuit Court of Appeals for the Ninth Circuit, where the conviction was affirmed on May 9th, 1927 (R. 756-772), Judge Rudkin dissenting (R. 772-9). A rehearing was denied July 18th, 1927 (R. 781), and, on a petition to this court, an order was entered on January 9, 1928, granting the petition of the plaintiffs in error for a writ of certiorari and directing the record to be certified to this court for a hearing on the merits as to the admissibility in evidence of certain conversations secured by Government agents by "tapping" the private telephone wires of the plaintiffs in error.

The record shows that before trial in the lower court the plaintiffs in error Olmstead and Finch petitioned that court to suppress certain evidence that had been obtained by Federal prohibition agents "tapping" the telephone wire leading into his home and listening in to conversations over such wire, upon the ground that such evidence was obtained in violation of his constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States (R. 172, pa. 17, R. 213, pa. 12). These petitions were considered and denied and exceptions duly taken, allowed and entered. (R. 223; 233; 236.)

Upon the trial, over the objections and exceptions of the plaintiffs in error, evidence to establish the charge in the indictment was introduced of conversations passing over such telephone wires and also over a telephone wire designated in the record as Eliot 6585, which was the telephone of all of the plaintiffs in error except Jerry L. Finch (R. 433; 527; 590; 615; 633; 640; 644).

Error was assigned upon these rulings (R. 333; 336). The Circuit Court of Appeals affirmed the ruling (R. 768), Judge Rudkin dissenting (R. 775). *Olmstead v. U. S.*, 19 Fed. (2nd), 842 (C. C. A.)

ARGUMENT

I.

The principles controlling this case were first announced by this court in the case of *Boyd v. United States*, 116 U. S. 616. These principles have never been deviated from but have been reiterated again and again by this court in a series of cases, the last of which is *Byars v. United States*, 47 Sup. Ct. Rep. 248 (not officially reported).

In the *Boyd* case this court said:

"The principles laid down in this (Lord Camden's) opinion affect the very essence of constitutional liberty and security. They reach farther than the con-

crete form of the case then before the court, with its adventitious *circumstances; they apply to all invasions, on the part of the government and its employes, of the sanctity of a man's home and the privacies of life.* It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of *personal security, personal liberty and private property,* where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camblden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation, but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. (Italics ours.)

"Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights

of the citizen, and against any stealthy encroachments thereon."

In *Gouled v. United States*, 255 U. S. 298, 65 L. Ed. 647, the court said:

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; in Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915 C, 1177, and in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319), have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property,' that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly over-zealous executive officers."

And in the *Byars* case the court ended its opinion with these words:

"The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

The admissibility of this "wire tapping" testimony is sanctioned by the majority opinion as follows:

"It was further ruled that the petition to suppress evidence obtained by tapping the telephone wires be denied. It is contended that by the latter ruling the defendants' rights under the Fourth and Fifth Amendments to the Constitution were violated. The protection of those amendments, however, has never been extended to the exclusion of evidence obtained by listening to the conversation of persons at any place or under any circumstances. The purpose of the amendments is to prevent the invasion of homes and offices and the seizure of incriminating evidence found therein. Whatever may be said of the tapping of telephone wires as an unethical intrusion upon the privacy of persons who are suspected of crime, it is not an act which comes within the letter of the prohibition of constitutional provisions."

II.

In the brief of the defendant in error and in the opinion of the Circuit Court of Appeals it is urged as controlling that the illegality of the method by which evidence is obtained, does not affect its admissibility. To a limited extent this is true. If incriminating evidence is secured by means of trickery, subterfuge, trespass or fraud, and after it has been so secured, finds its way into the hands of government officials, no legal ground can be urged against its introduction in evidence, for the reason that no constitutional question is involved. If, however, the fraud, subterfuge, trespass or theft is perpetrated by government officials, or if a government official participates directly or indirectly therein, the evidence thus secured is not admissible for the reason that it was secured in a manner which violates the provisions of the Fourth and Fifth Amendments to the Constitution of the United States. This is a distinction which the lower court seems to have lost sight of, although clearly drawn by this court.

In the case of *Byars v. United States, supra*, it was said on the subject:

"We do not question the right of the Federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account. But the rule is otherwise when the Federal

government itself, through its agents acting as such, participates in the wrongful search and seizure. To hold the contrary would be to disregard the plain spirit and purpose of the constitutional provisions intended to secure the people against unauthorized official action. The Fourth Amendment was adopted in view of a long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which regarded superficially may seem to escape the challenge of illegality, but which in reality strike at the substance of the constitutional right."

In a late case from a lower Federal court, *United States v. Mandel*, 17 Fed. Rep. (2nd) 270, the distinction which we are contending for is emphasized, as follows:

"It is an old and familiar rule that evidence otherwise competent will not be excluded because it may have been obtained by unlawful means. Bishop Atterbury's Trial, 16 How. St. Tr. 495, Commonwealth v. Dana, 2 Met. C. (Mass.) 329; Commonwealth v. Tibbets, 157 Mass. 519; People v. Adams, 176 N. Y. 351, and there are many cases to be found in the books where the Federal courts have recognized this rule. Stockwell v. United States, Fed. Cas. No. 13466, Adams v. N. Y., 192 U. S. 585; Hartman v. United States, 168 Fed. 30 (C. C. A.); Ripper v. United States, 178 Fed. 24 (C. C. A.); Lyman v. United States, 241 Fed. 954 (C. C. A.); Weeks v. United States, supra. It can no longer be doubted that

when the evidence results from the activities of those representing the government, the federal courts will not adhere to this ancient rule, but will inquire into the legality of those activities. Boyd v. United States, supra; Weeks v. United States, supra; Silverthorne Lumber Company v. United States, supra; Gouled v. United States, 255 U. S. 298; Amos v. United States, 255 U. S. 313; Byars v. United States, 47 Sup. Ct. Rep. 248; Sneider v. United States, 285 Fed. 1 (C. C. A.); Giles v. United States, 284 Fed. 208, especially if the defendant seasonably moves to have the evidence excluded or suppressed; Weeks v. United States, supra; Lyman v. United States, supra; Lum Yan v. United States, 193 Fed. 970 (C. C. A.); Youngblood v. United States, 266 Fed. 795 (C. C. A.)."

The same distinction is noted by Judge Rudkin in his dissenting opinion in the C. C. A. as follows:

"Here we are concerned with neither eavesdroppers nor thieves, nor are we concerned with the acts of private individuals, or the acts of municipal or state officers. We are concerned only with the acts of Federal agents, whose powers are limited and controlled by the Constitution of the United States."

III.

It was urged by the government that the "tapping" of a private telephone wire and listening in to conversations passing over such wire is not a search or seizure and hence not within the operation of

the Fourth and Fifth Amendments. The case of *Boyd v. United States, supra*, decides that point for us. Not only does it decide that point but it *rules this case*. The *Boyd* case was not a search and seizure case. It lays down search and seizure law, and nothing but search and seizure law, but it involved neither a search nor a seizure. Congress had passed an act providing that where an invoice or paper needed by the government in the prosecution of libels for the forfeiture of goods brought in in violation of the customs acts and regulations was in the possession of the defendant, the attorney for the government might make a motion describing the paper and setting forth what he expected to prove therefrom; and upon that motion the court might issue a notice to such defendant to produce the paper at the time of hearing. The penalty prescribed in the act for a noncompliance with the notice was that the allegations contained in the moving papers should be taken as confessed. The government had instituted proceedings to forfeit thirty-five cases of plate glass. In the proceedings Boyd became the claimant. A motion was made pursuant to this act and a notice issued to Boyd to produce a certain invoice at the hearing. Boyd complied, but under protest, saving his rights. The goods were forfeited. Boyd carried the proceedings to the Supreme Court. That was not search and seizure.

but these proceedings for the first time in the history of the court presented the question whether or not the government could compel a citizen to become an *unwilling* source of the evidence that would forfeit his property or convict him of crime. The court was determined that such a principle should never become engrafted upon the law of the land. They decided that before they wrote the opinion. A study of the facts in the decision reveals that thought. It was an act of Congress that had made possible the situation confronting the court. An act of Congress is the supreme law of the land, except the Constitution, which ranks it. To the Constitution then they looked. The only provisions there found that could be said to bear upon the situation were the Fourth and Fifth Amendments; the one prohibiting unlawful search and seizure, the other declaring that no person shall be compelled *in a criminal case* to be a witness against himself. But the proceeding before them was not a criminal proceeding; and the act in question saved an exception to applying it in criminal cases. The court got over that difficulty by saying: "We are also clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him though they may be civil in form are in their nature criminal." Next, it was not an instance of search or

seizure either, but the court reasoned it into one by showing the operation of the motion and notice to be the same in effect as a search and seizure; which the court deemed sufficient. Having brought the proceedings within the operation of the amendments, it then proceeded to lay down search and seizure law.

In *Silverthorne Lumber Company v. United States*, 251 U. S. 385, the case was ruled by application of the Fourth Amendment, but it was not a search and seizure case either. The government had made an unlawful search and seizure of the defendant's papers and had been forced by the lower court to return them. It then caused a subpoena to be issued and served upon the defendant to produce them. He refused and was fined and imprisoned for contempt. Upon appeal to the Supreme Court, it was held that the proceedings was an attempt to do indirectly what the government could not do directly.

In *Gouled v. United States, supra*, a party in the employ of the Intelligence Department of the United States Army in the guise of a social call had surreptitiously taken a paper from the office of the defendant. This is not a search and seizure as these words are employed in legal parlance, but the case was ruled by search and seizure law and application of the Fourth and Fifth Amendments.

Consequently, it is not necessary that the act complained of be strictly a search or seizure, if the effect of the act be to compel a man to furnish the evidence to convict himself of crime, and that the act be one of governmental agency.

The same thought is advanced by this court in a late decision, the *Village of Euclid v. Ambler Realty Company*, 47 Sup. Ct. Rep. 114 (not officially reported), as follows:

"While the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise."

IV.

In the *Boyd* case, *supra*, it is said:

"The principles laid down in this (Lord Camden's) opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; *they apply to all invasions on the part of the government and its employees on the sanctity of a man's home and the privacies of life.*" (Italics ours.)

These principles then apply to "all invasions on the privacies of life." No exact definition of this

term has been found, but obviously it is a comprehensive term and surely includes the right to be let alone. Webster's Dictionary defines "privacy" as follows:

1. State of being in retirement from the company or observation of others; seclusion.

2. A place of seclusion from company or observation; retreat; solitude; retirement.

3. Concealment of what is said or done; secrecy.

4. A private, personal or secret matter.

If one has engaged a telephone from a public service corporation, that telephone is his against all the world except the company, and it is his against the company, too, if all tolls are paid. The right to the exclusive enjoyment of that telephone free of interference from anybody is a right of privacy. No government agent has a right to interpose an earpiece upon it any more than he has a right to raise the curtain and peek through another's window. If two persons are conversing together in a room of one of them, an intrusion therein by a government agent secretly is an intrusion upon their right of privacy. Is it any the less so if they are in separate rooms connected by a telephone and some interloper "listens in" by means of "tapping" upon the wire? Such conduct constitutes an invasion on the privacies of life and when done by a government agent falls within the

condemnation of the *Boyd* case, and evidence thereby secured is inadmissible for the purpose of securing a conviction in a criminal case. As was aptly said by Judge Rudkin in his able dissenting opinion herein:

"A person using the telegraph or telephone is not broadcasting to the world. His conversation is concealed from the public as completely as the nature of the instrumentalities employed will permit, and no Federal officer or Federal agent has a right to take his message from the wires, in order that it may be used against him. Such a situation would be deplorable and intolerable, to say the least. Must the millions of people who use the telephone every day for lawful purposes have their messages interrupted and intercepted in this way? Must their personal, private and confidential communications to family, friends and business associates pass through any such scrutiny on the part of agents in whose selection they have no choice, and for the faithful performance of whose duties they have no security; agents, whose very names and official stations are in many instances concealed from them? If ills such as these must be borne, our forefathers signally failed in their desire to ordain and establish a government to secure the blessings of liberty to themselves and their posterity." (R. 772-9.)

V.

The majority opinion of the C. C. A. relies for support on *State v. Hester*, 134 S. E. Rep. 885 (S. C.), and *Adams v. N. Y.*, 192 U. S. 585. Neither of these

cases supports the text. In the case of *State v. Hester*, three defendants under indictment were lodged in a cell and their conversation overheard by the use of a dictaphone. The conversation so overheard was admitted by the trial court, and this action was sustained on appeal, not because of any constitutional limitation or inhibition, for no such question was raised, but because the evidence failed to establish that they had been entrapped by the authorities.

The *Adams* case has been limited and qualified by this court in a recent decision, *Marron v. United States*, 48 Sup. Ct. Rep. 74 (not officially reported). Referring to that case, this court says:

"The government relies on Adams v. New York, 192 U. S. 585. That was a prosecution in a state court. It involved no search or seizure under the law, or by an officer of the United States. The Court of Appeals, in People v. Adams, 176 N. Y. 351, held that the provisions of the Federal Constitution did not apply; that the use of the private papers as evidence did not violate the state Constitution; declaring that it expressed no opinion as to the seizure, and applied the rule that a court when engaged in trying a criminal case will not take notice of the manner in which the witness obtained papers offered in evidence. And this court assuming, without deciding, that the Fourth and Fifth Amendments were applicable, held the use of the private papers as evidence did not violate any right safeguarded by these amendments, and after reference to the procedure at the trial declared that,

'the court did not stop to inquire as to the means by which the evidence was obtained,' but the court did not decide whether the seizure violated the Fourth Amendment. It decided that the admission in evidence of the private papers did not infringe the Fourth or Fifth Amendments. The case does not support the government's contention. See Weeks v. United States, supra; Silverthorne Lumber Company v. United States, 251 U. S. 385; Agnello v. United States, supra."

CONCLUSION

We respectfully submit that the judgment of the Circuit Court of Appeals herein should be reversed and this case remanded to the trial court for a new trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 493

ROY OLMSTEAD, JERRY L. FINCH, CLARENCE G. Healy, Cliff Maurice, Tom Nakagawa, Edward Engdahl, Myer Berg, John Earl, and Francis Richard Brown, petitioners

v.

UNITED STATES OF AMERICA

No. 532

CHARLES S. GREEN, EMORY A. KERN, Z. J. HEDRICK, Edward Erickson, William P. Smith, David Trotsky, Louis O. Gilliam, Clyde Thompson, and B. G. Ward, petitioners

v.

UNITED STATES OF AMERICA

No. 533

EDWARD H. MCINNIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS OF THE LOWER COURTS

The opinions of the Circuit Court of Appeals are reported in 19 F. (2d), at pages 842 and 850. The

opinions of the District Court on preliminary matters are reported as follows: Upon motions to strike pleas in abatement, 7 F. (2d) 756; upon demurrers to the indictment, 5 F. (2d) 712; upon petition to quash search warrant, to return property and to suppress evidence, 7 F. (2d) 700.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered May 9, 1927 (R. 780; S. 596.)[1] Rehearings were denied July 18, 1927. (R. 781; S. 597.) The petition for certiorari in No. 493 was filed August 30, 1927, and in Nos. 532 and 533 September 9, 1927. The petitions were denied by orders entered November 21, 1927. Petition for rehearing in No. 533 was denied by order entered January 3, 1928. Upon a similar petition filed in No. 532 all three petitions were reconsidered and an order made January 9, 1928, granting the writs. Jurisdiction to issue a writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED

The order granting the writs expressly limits their consideration to the single question of—

> whether the use of evidence of private telephone conversations, between the defendants

[1] NOTE.—There are three petitions, docketed as Nos. 493, 532, and 533. The latter two are upon the same record, differing somewhat from the record in No. 493. For convenience in reference the letter "R" will be used to refer to the record in No. 493 and the letter "S" to the record in Nos. 532 and 533.

and others, intercepted by means of wire tapping, is a violation of the Fourth and Fifth Amendments and, therefore, not permissible in the Federal courts.

THE CONSTITUTIONAL PROVISIONS

Petitioners rely upon the Fourth and Fifth Amendments to the Constitution. The Fourth is:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The relevant portion of the Fifth is:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

The petitioners were convicted in the District Court of the United States for the Western District of Washington of a conspiracy to violate the National Prohibition Act by possessing, transporting and importing intoxicating liquors and maintaining common nuisances, and by selling intoxicating liquors in violation of the Act. (R. 250-254; S. 45-49.) Of seventy-two others jointly indicted with the petitioners, some were not apprehended,

some were acquitted, others pleaded guilty. The cases being carried to the Circuit Court of Appeals upon writs of error, the judgments of the District Court were affirmed. Petitions for rehearing were denied. (R. 781; S. 597.) In petitioning this Court for writs of certiorari, Edward H. McInnis filed a separate petition, docketed as No. 533, the others dividing into two groups, nine joining in the petition docketed as No. 493 and nine others joining in the petition docketed as No. 532.

The evidence in the records discloses an illegal liquor business of amazing magnitude, involving the employment of two seagoing vessels for the transportation of liquor from Scotland to British Columbia, the employment of smaller vessels for coastwise transportation to the State of Washington, the use of a large underground cache out of Seattle and a number of smaller caches in the city for retail purposes, the maintenance of a central office manned with operators, the employment of executives, salesmen, deliverymen, dispatchers, scouts, bookkeepers, collectors, and an attorney. Monthly transactions reached as high as $176,000. (R. 169–182; 216–231; 480; S. 380–384, and see District Court's summary of the evidence to the jury, R. 717–732.)

It is not possible to clearly make out from the record the exact relationship of each of the petitioners to the organization. It appears that some of the petitioners had a proprietary interest in the

business while others were salaried employees. At one time, according to testimony, it was agreed that a capital fund should be made up by a contribution of $10,000 by the petitioner Olmstead and contributions of $1,000 each by eleven others, and that the profits were to be divided one-half to Olmstead and the remaining half to the other eleven. Those appearing to have a proprietary interest include six of the petitioners, viz: Olmstead, Gilliam, Ward, Berg, Earl, and Trotsky. (R. 169–189; 380–384; S. 380–384.)

The information which led to the discovery of the conspiracy and its nature and extent was in large part obtained through the wire-tapping operations of four Federal prohibition officers. Taps were made of the telephone wires leading from the residences of four of the petitioners and were also made from the wires leading from the office of the organization, 1025 Henry Building. The houses with which connections were thus made were those of Olmstead, Elbro, Green, Finch and Fletcher, all of whom are numbered among the petitioners except Elbro and Fletcher. The taps apparently were made in all cases without trespass upon any property of the petitioners, for example, the taps to the Henry Building office were made one from the basement and one from a toilet room. The house taps appear to have been made from the street. (R. 196–197; S. 192, 267, 286, 310, 322, 330, 331, 338, 368, 390.) The testimony of the prohibition agents

as to the conversations between the petitioners thus overheard by them extends through a large part of the records and includes testimony as to conversations by all of the petitioners with the exception of Ward and Erickson. These telephone conversations related to the various phases and details of the liquor business being carried on by the organization and were in furtherance of that business. The greater portion of them came from the Henry Building office. One of the overt acts charged in the indictment was the maintenance at 1025 Henry Building of a nuisance by their keeping, selling and bartering intoxicating liquors. (R. 435, 518, 580, 631; S. 267, 286, 344, 381, 390.) There is no evidence that this office was ever used or intended for any purpose other than to carry on the organization's illegal liquor business.

SUMMARY OF ARGUMENT

It was a general rule at common law that the admissibility of evidence offered in a criminal case was not affected by illegality of the means employed in obtaining it. The use of evidence illegally obtained was not deemed to be in violation of the common law rule against self-incrimination, of which the Fifth Amendment is but a concrete expression, nor did it violate any other right of the accused. The exceptions to this rule are foreign to the case at bar. This rule of the common law has been modified by decisions of this Court to the extent of holding that evidence procured in viola-

tion of the "search and seizure" clause of the Fourth Amendment is inadmissible under the Fifth Amendment. Except for this modification the common law rule still prevails. The "wire-tapping" evidence is therefore admissible unless it offends the Fourth Amendment. By no reasonable construction of this Amendment can it be extended to apply to oral statements or conversations surreptitiously overhead without physical invasion or trespass upon the property of the accused. There is nothing in the history of the Amendment to support a claim for so broad a construction, and the language of the Amendment does not permit it.

ARGUMENT

I

The Evidence Obtained by Means of the "Wire-Tapping" Operations of the Federal Prohibition Agents Was Admissible Unless These Operations Constitute an "Unreasonable Search and Seizure" Within the Meaning of the Fourth Amendment

The Fifth Amendment can only be invoked by first showing that there has been a violation of the Fourth Amendment. The third clause of the Fifth Amendment "nor shall be compelled in any criminal case to be a witness against himself" merely gave constitutional sanction to a rule of common law well established at the time the Constitution was adopted.

Jones, Commentaries on Evidence (2d Ed.), Vol. 6, Sec. 2474;

Twining v. *New Jersey*, 211 U. S. 78.

Obviously the case at bar has nothing to do with the provision against self-incrimination in its original and primary sense, that is, the compulsion of the accused by legal process to produce in court evidence either testimonial or physical. Ordinarily evidence of incriminating oral statements made by the accused before, during, or after the commission of a crime, overheard by a witness and testified to by him in court, is always competent.

This is too elementary to require discussion. The only inhibition against evidence in this form is that which forbids evidence of extorted confessions. Here there was neither extortion nor confession. There was no coercion, threat or promise. Moreover, the conversations were not in the nature of confessions. They consisted of the oral giving and taking of orders for intoxicating liquors, the direction of the business, inquiries as to the progress of shipments, and the like. They were a part and parcel of the criminal transaction. The prohibition officers, relating in court what they overheard, were testifying as immediate witnesses of the crime as much so as would be a witness who testified to having seen liquor delivered and the price paid.

Aside from the rule against duress of legal process and extorted confessions, it was a fundamental and time-honored rule of common law that evidence was not rendered inadmissible in a criminal case by

illegality of the means by which it was obtained. This rule of the common law is still in force in England and Canada and in a majority of the States. The illegality dealt with in many of the State cases was the violation of constitutional rights under provisions of State constitutions substantially identical with the Fourth Amendment.

> Jones, Commentaries on Evidence (2d Ed.), Vol. 5, Chap. 22;
>
> Blakemore on Prohibition (2d ed.), p. 519 et seq.
>
> Cornelius on Search and Seizure, p. 45;
>
> "Use of Evidence Obtained by Illegal Search and Seizure," Vol. 8, Am. Bar Assn. Journal, p. 479, Aug. 1922, where the English, Canadian, and all Federal and State cases are collected;
>
> *State* v. *Arme*, 62 Utah 476;
>
> *State* v. *Owens*, 302 Mo. 348; Ann. 32 A. L. R. 383.

The States which have departed from the common law rule have done so under the influence of *Boyd* v. *United States*, 116 U. S. 616, and later decisions of this Court, which will be considered hereafter.

This common law doctrine once received the approval of this Court in *Adams* v. *New York*, 192 U. S. 585, in which, assuming that the Fourth and Fifth Amendments applied to the action of State officers, the Court held that no constitutional right of the accused had been violated.

Prior to the *Adams case* it had been held in *Boyd* v. *United States, supra*, that the compulsory production of a man's books and papers to be used in evidence against him in a criminal proceeding was equivalent to an "unreasonable search and seizure" prohibited by the Fourth Amendment, and was therefore a violation of the self-incrimination prohibition of the Fifth Amendment.

In *Weeks* v. *United States*, 232 U. S. 383, there was again presented the question of admissibility of evidence seized in violation of the Fourth Amendment. No criticism was made of the approval of the common law rule in the *Adams case*, but deeming the basis of the rule to be the avoidance of collateral issues in the trial of criminal cases this Court held that the case was taken out of the rule by an application made to the court below before trial for the return of the goods wrongfully seized, and the evidence was held inadmissible.

Silverthorne Lumber Co. v. *United States*, 251 U. S. 385, was on this point differentiated from the *Adams case* on the authority of the *Weeks case*.

In *Gouled* v. *United States*, 255 U. S. 298, it was held that where the defendant first learned during the progress of the trial of a seizure in violation of the Fourth Amendment, objection to the evidence then was timely and well taken.

Agnello v. *United States*, 269 U. S. 20, held that the rule of the *Adams case* did not apply where by

the uncontradicted facts it appeared that the proffered evidence had been seized in violation of the Fourth Amendment.

The holding in *Amos* v. *United States*, 255 U. S. 313, is similar to that in the *Agnello case*.

In *Byars* v. *United States*, 273 U. S. 28, a motion for a return of the evidence had been made before trial, and it was held that this laid proper foundation for objection upon the trial.

Finally in *Marron* v. *United States* (decided Nov. 21, 1927, No. 185, Oct. Term, 1927) this Court declared broadly:

> It has long been settled that the Fifth Amendment protects every person against incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment.

In the light of these decisions it is not open to question that evidence obtained by Federal officers in violation of the Fourth Amendment is inadmissible as evidence in criminal trials in Federal courts. To that extent the common law rule and anything said to the contrary in the *Adams case* has been abandoned.

The limits of this departure from the common law rule are, however, definite. The reason for it appears to be the close interrelation that is conceived to exist between the Fourth and the Fifth Amendments. It has never been extended to evidence obtained illegally in the general sense, but

only where the illegality amounts to a violation of the Fourth Amendment. Evidence obtained by trespass, by fraud, by unethical or even criminal methods is admissible if the Fourth Amendment be not violated.

> Jones on Evidence (2d Ed.), Vol. 5, Sec. 2075 et seq.;
> *Adams* v. *New York*, *supra*;
> *Hester* v. *United States*, 265 U. S. 57;
> *McGuire* v. *United States*, 273 U. S. 95;
> *Koths* v. *United States*, 16 F. (2d) 59 (9th Cir.);
> *United States* v. *Mandel*, 17 F. (2d) 270 (D. C. Mass.).

The Fifth Amendment therefore is not involved in this case, unless it can be invoked as a result of a violation of the Fourth Amendment.

II

THE "WIRE-TAPPING" OPERATIONS OF THE FEDERAL PROHIBITION AGENTS WERE NOT A "SEARCH AND SEIZURE" IN VIOLATION OF THE SECURITY OF THE "PERSONS, HOUSES, PAPERS, AND EFFECTS" OF THE PETITIONERS IN THE ORIGINAL SENSE OR WITHIN THE INTENDMENT OF THE FOURTH AMENDMENT.

If the "wire-tapping" operations of the prohibition agents, involving no entry of the petitioner's houses, constitute a "search and seizure" violating the security of the "persons, houses, papers" or "effects" of the petitioners, such search and seizure was unreasonable. There was no warrant.

There were no circumstances authorizing a search without warrant according to the rules of the common law or any statute of the United States. The search, if "search" there was, had for its object the detection of crime and the acquisition of evidence.

ORIGIN OF THE FOURTH AMENDMENT

An examination of the historical background of the Fourth Amendment leaves no doubt but that the adoption of this Amendment was the direct consequence of two abuses practiced by the English Government—the use of general warrants and the use of writs of assistance. Some writers have seen an additional influence in the "letters de cachet" which were still in use in France at the time of the American Revolution and which were even more vicious in character than the general warrants or writs of assistance.

General warrants had been used by the English sovereigns for more than a century prior to the celebrated Wilkes case in 1763. Their most notable employment during the preceding period was for the suppression of seditious libels against the government. The warrants commanded the officers to whom they were directed to search and seize disloyal writings and their authors, without limit as to the place or person or particular description as to the object of the search. Armed with these warrants the officers went about on their "roving com-

mission," guided by idle rumor and common gossip, invading houses, seizing private books and papers and arresting persons at will. The practice culminated in the famous cases of John Wilkes and John Entick. They are typical of what was then common. The former was the author of the "North Briton," the latter of the "Monitor," both attacking the Government.

Lord Halifax, secretary of state in 1763, issued a warrant to four messengers "to make strict and diligent search for the authors, printers, and publishers of the North Briton, No. LXV, and to apprehend and seize them, together with their papers, and bring them in safe custody before him." The publisher was then unknown. Forty-nine persons were arrested on suspicion. Wilkes was seized, his house ransacked, and all of his private papers were taken. He was convicted of publishing a seditious libel, but later turned on his accusers, sued civilly for false arrest, and secured verdicts of damages against Lord Halifax and his messengers. It was held that the general warrants under which his house was raided and he was arrested were illegal. A similar history is presented by the case of John Entick, publisher of the "Monitor." There was a like arrest and seizure and ensuing action for damages this time for trespass against the king's messengers, resulting in recovery. Lord Camden pronounced an elaborate judgment holding the warrant illegal. The judgment is quoted at length in the opinion in *Boyd* v.

United States, supra. These two cases in their criminal and civil aspects attracted universal attention and aroused tremendous opposition to the use of general warrants, resulting in their condemnation by the courts and a declaration of their illegality by the House of Commons.

May's Constitutional History of England, p. 110, et seq., p. 245, et seq.:
Cooley's Constitutional Limitations, 8th Ed., Vol. 1, p. 612;
Boyd v. *United States, supra;*
19 How. State Trials, pp. 1029 and 1153.

The use of writs of assistance in the American colonies was expressly authorized by an Act of Parliament of 1767 (7 Geo. III, Cap. 46) entitled "An act for granting certain duties in the British colonies and plantations in America * * * and for more effectually preventing the clandestine running of goods in the said colonies and plantations." The Act authorized the superior or supreme court of justice in the several plantations to grant writs of assistance authorizing customs officials "to enter and go into any house, warehouse, shop, cellar, or other place, in the British colonies or plantations in America, to search for and seize prohibited or uncustomed goods" in the manner directed by the Acts of 14 Charles II and 7 and 8 William III, which authorized the searcher, in case of resistance, to break open doors, chests, and trunks. The most oppressive use of this writ was commenced in 1760, when William Pitt determined to

enforce the Sugar Act of 1733, which, among other things, provided a prohibitive duty on molasses brought into the northern colonies from other than British plantations, of which there had been extensive importations principally for distillation into rum, used by the colonies as a currency in their fur and other trade.

The use of the writs soon led to great public agitation and opposition, particularly in Massachusetts, led by James Otis, but their use continued to the outbreak of the Revolution. Channing's History of the United States, Vol. III, pp. 1–5 and 114. Knowledge and apprehension of these abuses—warrants and writs—was fresh in the minds of the colonial statesmen when it came to framing the Constitution. In the Virginia convention Patrick Henry, opposing the adoption of the Constitution, declared that without a bill of rights "excisemen may come in multitudes * * * go into your cellars and rooms, and search, and ransack, and measure, everything you eat, drink, and wear * * *." (Beveridge's Life of Marshall, Vol. I, p. 440.) The Virginia Constitution had already adopted a bill of rights, of which Section 10 was as follows:

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not

> particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

An amendment to the Federal Constitution similar to this was proposed by the Virginia ratification convention. (*Journal of the Convention of Virginia*, p. 34.) As introduced by James Madison at the first session of Congress it read:

> The right of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized. [Annals of Congress, vol. I, col. 434.]

A committee of one member from each State was appointed to consider and report such Amendments as ought to be proposed by Congress to the legislatures of the States. In the report of this committee was proposed an Amendment differing but slightly from that originally proposed by Madison. The word "effects" was substituted for the words "other property." Mr. Gerry, saying that he presumed there was a mistake in the wording of the clause, moved that it be amended to read:

> The right of the people to be secured in their persons, houses, papers, and effects against unreasonable seizures and searches * * *. [Annals of Congress, vol. I, col. 754.]

The Amendment came out of conference committee in its present form, and we have no light as to the reason for the further change in phraseology.

It is quite apparent that the principal, if not the sole, peril in the minds of those who advocated the Amendment and against which its protection was intended was the use of general warrants and the writs of assistance.

DECISIONS OF THIS COURT

A brief review will now be made of the decisions of this Court construing the Fourth Amendment in relation to the use of evidence obtained in violation of its "search and seizure" clause, mainly to show the limits within which the Amendment has been applied rather than with the thought that any of the decisions included are decisive of the case now before the Court.

In *Ex parte Jackson*, 96 U. S. 727, the defendant had been convicted of depositing in the mail a circular advertising a lottery, in violation of Section 3894, Revised Statutes. His sole contention was that the Act was unconstitutional. This Court held otherwise. In the opinion it was said that the constitutional guaranty against unreasonable searches and seizures extended to sealed letters and packages being transported in the course of the mails, and that while in the mail such sealed matter can be opened and examined only under proper warrant

issued, but that the officers of the Postal Service in many instances can act upon their own inspection where the matter is unsealed and exposed to view and shows unmistakably that it is prohibited.

Boyd v. *United States*, 116 U. S. 616, is the leading case on search and seizure. There was an information against thirty-five cases of plate glass alleged to have been imported with fraudulent evasion of the tariff duty, the Act of June 27, 1874, providing in such cases for fine and forfeiture of the goods. (18 Stat. 186.) This Act also authorized the courts of the United States, in all suits and proceedings, other than criminal, arising under the revenue laws of the United States, on motion of the Government to require the defendant or claimant to produce all of his books, invoices or papers alleged by the Government attorney to contain any evidence for the Government, according to his belief; upon failure to produce, the allegations of the Government stood confessed. Custody of the records and documents produced was to remain in the defendant subject to the order of the court and subject to the right of the Government attorney to examine and offer in evidence. Under this Act the claimant was required to produce the invoice of the goods for inspection, and being produced they were received in evidence over the claimant's protest. This Court held the Act to be unconstitutional as applied to a suit for forfeiture of goods, as being repugnant to the Fourth and Fifth Amendments to the

Constitution. In its opinion the Court, speaking by Mr. Justice Bradley, expressed the view that (p. 622)—

> a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be,

and that such compulsory production was equivalent to a search and seizure. The origin of the Fourth and Fifth Amendments was traced historically to the experience of the English people and colonists with general warrants and writs of assistance. Great importance was attributed to the judgment of Lord Camden in *Entick* v. *Carrington*, 19 Howell's State Trials, 1029. The intimate relation between the Fourth and Fifth Amendments was emphasized, the Court observing (p. 633):

> They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.

The opinion contains some sweeping statements, which have ever since been the favorite resort of all litigants who have sought to extend the scope of the Fourth Amendment.

In *Adams* v. *New York*, 192 U. S. 585, the defendant had been convicted of operating a lottery in violation of a statute of the State of New York. Officers under a search warrant seized not only the lottery paraphernalia described in the warrant, but also other private papers of the defendant, which were used in evidence to identify the defendant's handwriting. Having come up on writ of error this Court assuming, without deciding, that the Fourth and Fifth Amendments applied to the action of State officers, concluded that there had been no violation of these Amendments, apparently taking the view that the seizure of the private papers was a reasonable incident to the execution of the warrant. The Court in its opinion, referring to the Fourth and Fifth Amendments, said (p. 598):

> The origin of these amendments is elaborately considered in Mr. Justice Bradley's opinion in the *Boyd case*, *supra*. The security intended to be guaranteed by the Fourth Amendment against wrongful search and seizure is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction,

> and to give remedy against such usurpations when attempted. But the English and nearly all of the American cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent.

In *Weeks* v. *United States*, 232 U. S. 383, a defendant was convicted of using the mails for transporting lottery coupons and tickets in violation of Section 213 of the Criminal Code. After his arrest police officers went to his house, obtained a key, entered and search his rooms and seized various papers and articles, which were turned over to the United States marshal. Later the same officers returned with the marshal to search for additional evidence and seized certain letters and envelopes. There was no search warrant. The letters thus seized were used in evidence. In this Court the judgment was reversed upon the ground that the illegal search and seizure violated the rights of the defendant under the Fourth and Fifth Amendments. With reference to the Fourth Amendment, the Court, by Mr. Justice Day, said in its opinion (p. 390):

> * * * it took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American people, among other things, those safeguards which had grown up in England to protect the people from unreasonable

> searches and seizures, such as were permitted under the general warrants issued under authority of the Government, by which there had been invasions of the homes and privacy of the citizens and seizure of their private papers in support of charges, real or imaginary, made against them. Such practices had also received sanction under warrants and seizures under the so-called writs of assistance, issued in the American colonies.

Perlman v. *United States*, 247 U. S. 7. During the pendency of an equity suit Perlman produced in evidence, as part of his testimony, certain papers, models, etc., owned by him. They were impounded as exhibits and subsequently delivered without his consent to the district attorney, by whom they were proposed to be used as evidence against him in a prosecution for perjury. The appeal was from the denial of a petition of Perlman to restrain such use. The order was affirmed. Perlman's contention was that the impounding and use of the exhibits by the United States before the grand jury constituted an unreasonable seizure and made him a compulsory witness against himself, in violation of the Fourth and Fifth Amendments. This Court said (p. 15):

> * * * their production was voluntary, no form of constraint or compulsion or extortion was put upon him, and that some one of them must exist is the test of immunity.

In *Stroud* v. *United States*, 251 U. S. 15, it appeared that a prisoner committed murder in a peni-

tentiary. He subsequently wrote certain letters, which, under the practice of the institution, were turned over to the warden, who furnished them to the district attorney, who in turn used them as evidence of his guilt in the prosecution for the homicide. It was held that there was no unreasonable search or seizure and no violation of the constitutional prohibition against self-incrimination.

In *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, there was an indictment against the two Silverthornes, officers of the Lumber Company. While they were detained in custody a representative of the Department of Justice, without warrant or authority, went to the office of the company and made a clean sweep of all of its books, papers, and documents found there. They were used as evidence before the grand jury, and photographs and copies were made. An application for their return was then granted, but the photographs and copies were impounded by the court. Later the Silverthornes were subpœnaed to produce the originals, an order made that the subpœna be complied with, and upon refusal of compliance judgment of contempt was entered against them. This judgment was reversed upon the ground that the rights of the corporation against unlawful search and seizure had been violated.

In *Gouled* v. *United States*, 255 U. S. 298, it appeared that Gouled was convicted of being a party to a conspiracy to defraud the United States, and of having used the mails to promote a scheme

to defraud the United States, in violation of Sections 37 and 215 of the Criminal Code. Previous to the indictment, and when Gouled was under suspicion, a representative of the Intelligence Department, an acquaintance of Gouled, under guise of a friendly call, gained admission to his office, and in his absence, without warrant, seized and carried away a document having evidential value only, which was delivered to the district attorney and put in evidence over Gouled's objection that it was obtained in violation of the Fourth and Fifth Amendments, a contention which was sustained in this Court. Extracts from the opinion follow (p. 306):

> * * * whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the Government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment.

It was held that under such circumstances the use in evidence of a document thus obtained was a violation of the Fifth Amendment.

> In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private

> papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment for bids that he shall be compelled to be a witness against himself in a criminal case (p. 306).
>
> That the papers involved are of no pecuniary value is of no significance. Many papers, having no pecuniary value to others, are of the greatest possible value to the owners and are property of the most important character (p. 310).

Amos v. *United States*, 255 U. S. 313, dealt with a case where two deputy revenue collectors went to defendant's house in his absence, told his wife that they were revenue officers and had come to search the premises for violation of the revenue law, whereupon they were admitted, searched the house, and found certain whiskey, which was introduced in evidence in prosecution of the defendant. This Court held that there was a plain violation of the Fourth and Fifth Amendments and that there was no waiver of the defendant's rights by the admission to his house by his wife because of the implied coercion, even though it were possible for a wife thus to waive her husband's constitutional rights.

In *Burdeau* v. *McDowell*, 256 U. S. 465, certain books and papers were stolen from the defendant and turned over to the Department of Justice. The District Court, upon defendant's application, made an order for their return to the defendant and enjoined their use by the Department of Jus-

tice as evidence against him in criminal proceedings. The order was reversed. This Court held that the use of the books and papers in evidence would not under the circumstances infringe upon the defendant's constitutional rights for the reason that the Government had not participated in the original wrongful seizure, saying (p. 475):

> * * * it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.
>
> In the present case the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property * * *. * * * whatever wrong was done was the act of individuals in taking the property of another. * * *

In *Hester* v. *United States*, 265 U. S. 57, it appeared that revenue officers testified to finding moonshine whiskey in a broken jug and other vessels near the house where the defendant resided and as to suspicious conduct of the defendant there observed. The Court, assuming that the premises on which the revenue officers had found the evidence and observed the defendant were his property, held that nevertheless the evidence was admissible, saying (p. 58):

> It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The

> defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned. This evidence was not obtained by entry into the house and it is immaterial to discuss that. The suggestion that the defendant was compelled to give evidence against himself does not require an answer. * * * the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects" is not extended to open fields.

In *Carroll* v. *United States*, 267 U. S. 132, it was held that the search without a warrant of an automobile and seizure of liquor found in it in the course of transportation in violation of the Prohibition Act did not violate the Fourth Amendment, if the search and seizure was made upon probable cause. In the opinion by Chief Justice Taft it was said (p. 153):

> * * * the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a war-

> rant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Concerning the construction of the Fourth Amendment it was further said (p. 149):

> The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

In *Agnello* v. *United States*, 269 U. S. 20, it was held that the right to search which is incidental to a lawful arrest can not be extended to a search of the dwelling house of the person arrested several blocks from the place of arrest after the offense has been committed and while he is in custody elsewhere; that the seizure of evidence upon such search violated the Fourth Amendment, and its admission upon the criminal trial was a violation of the Fifth Amendment.

> It is well settled that, when properly invoked, the Fifth Amendment protects every person from incrimination by use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment. (p. 33.)

In *Byars* v. *United States*, 273 U. S. 28, it appeared that certain State officers, about to make a search under a warrant for "intoxicating liquors and instruments and materials used in the manu-

facture of such liquors," were upon their invitation joined by a Federal prohibition agent, who in the course of the search found counterfeit strip stamps, which were used as evidence in a prosecution of the owner, resulting in his conviction. The judgment was reversed upon the ground that the stamps were obtained by unconstitutional search and seizure.

McGuire v. *United States*, 273 U. S. 95. Revenue agents, acting under a warrant, searched defendant's premises, discovering intoxicating liquor. Two bottles were taken as evidence and, wholly without authority, the rest destroyed. On the trial the two bottles were received in evidence over objection, it being contended by the defendant that on account of the unauthorized destruction of the liquor the officers became trespassers *ab initio* and lost the protection of the search warrant, and that in consequence the bottles were taken in violation of the Fourth Amendment and their reception in evidence was in violation of the Fifth Amendment. The conviction was upheld, the Court taking the view that whether or not the officers were trespassers *ab initio* was immaterial. The opinion has this pertinent language (p. 99):

> Even if the officers were liable as trespassers ab initio, which we do not decide, we are concerned here not with their liability but with the interest of the Government in securing the benefit of the evidence seized, so far as may be possible without sacrifice of the

> immunities guaranteed by the Fourth and Fifth Amendments. A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule. The use by prosecuting officers of evidence illegally acquired by others does not necessarily violate the Constitution nor affect it admissibility.

The case of *United States* v. *Lee*, 274 U. S. 559, involved the search and seizure by a coast guard patrol boat of an American motor boat beyond the twelve-mile limit on the high seas for violation of the revenue laws. The patrol drew up alongside the motor boat and threw a searchlight upon her deck. Cans of alcohol were discovered. Two of the occupants of the motor boat were convicted of conspiracy to violate the Tariff and Prohibition Acts. The Circuit Court of Appeals vacated the judgment on the ground that evidence had been admitted which was obtained by an illegal search and seizure. This Court granted a writ of certiorari and reversed the order vacating the judgment. Incidental to its decision this Court held that there had been no "search" on the high seas. It said (p. 563):

> But no search on the high seas is shown. The testimony of the boatswain shows that he used a searchlight. It is not shown that there was any exploration below decks or under hatches. For aught that appears, the cases of liquor were on deck and, like the defendants, were discovered before the motor

boat was boarded. Such use of the searchlight is comparable to the use of a marine glass or field glass. It is not prohibited by the Constitution.

In *Marron* v. *United States*, decided by this Court November 21st last, it appears that officers engaged in the search of premises for intoxicating liquor under a warrant arrested one engaged in the act of making sales. It was held that as an incident to the arrest the officers might seize ledgers and bills which were a part of the outfit or equipment actually used in the business, though not on the person of the one arrested or in his immediate possession or control. The contention that the Fourth Amendment had been violated was not sustained.

Three cases of some interest, in which claims were made under the Fifth Amendment only, are:

Holt v. *United States*, 218 U. S. 245;

Matter of Harris, Bankrupt, 221 U. S. 274;

Johnson v. *United States*, 228 U. S. 457.

The *Harris* and *Johnson* cases involved the question of whether books and records of a bankrupt, transferred to the trustee pursuant to a requirement of the Bankruptcy Act, could be taken from the trustee by the prosecuting attorney and used as evidence in a criminal prosecution of the bankrupt. This right was affirmed in both cases. In the *Harris* case the Court said (p. 279):

> The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story.

And in the *Johnson case* (pp. 458, 459):

> A party is privileged from producing the evidence but not from its production. * * *
>
> * * * If the documentary confession comes to a third hand *dio intuita*, as this did, the use of it in court does not compel the defendant to be a witness against himself.

In searching the foregoing decisions for a precedent to apply in the case at bar we are at once met by the lack of analogy. The *Lee case* comes nearest to furnishing one, and there it was held that there was no violation of constitutional rights. In every case in which a violation of the Fourth Amendment was found to have occurred the decision without exception dealt with a case in which the object of the search and seizure condemned was literally described by the language of the Amendment; that is, "persons, houses, papers, and effects," "effects" used in the sense of tangible personal property. In no case was there involved anything of the nature of oral communications or conversations. The Circuit Court of Appeals spoke advisedly when it said of the Fourth and Fifth Amendments that their protection "has never been extended to the exclusion of evidence obtained by listening to the conversation of persons at any place or under any circumstances." (R. 768.)

STATE CASES

Little help is found in the State decisions. There are three dictaphone cases, in which constitutional rights appear not to have been considered, probably because no one thought such a claim would be sound.

In *State* v. *Hester*, 137 S. C. 145, evidence of a conversation between the defendants overheard by a jailor through the installation of a dictaphone in the prison cells occupied by the defendants was held admissible as against the objection that such statements were not free and voluntary and the objection that the defendants were entrapped by artifice.

Brindley v. *State*, 193 Ala. 43, was a similar case in which dictaphone evidence was held properly received, but the court appears to have considered it only from the standpoint of its competence and probative value.

The same is true of *State* v. *Minneapolis Milk Co.*, 124 Minn. 34, where detectives testified as to proceedings of a meeting of milk dealers overheard by placing a dictaphone in the wall of the room where the meeting was held.

In *Leatherman* v. *State*, 11 Ga. App. 756, evidence of the commission of a crime, obtained by placing a searchlight through a broken pane in the window of the defendant's house, was held not inadmissible as having been obtained in violation of

the defendant's constitutional right to be protected from an illegal search.

In *Eversole* v. *State*, 106 Tex. Crim. Rep. 567, a witness secreted himself in a barn of the defendant and gave evidence of acts of the defendant done therein and observed by him. It was held that there was no violation of the search and seizure law of Texas forbidding search of a "private residence, actual place of habitation, place of business, person or personal possessions" without a search warrant.

In *Smith* v. *United States*, 2 F. (2d) 715, the Circuit Court of Appeals for the Fourth Circuit held that the turning of a flashlight on the floor of an open automobile by Federal officers was not a "search." The court observed (p. 716):

> A search implies some exploratory investigation.

PRINCIPLES OF CONSTRUCTION

In *Ogden* v. *Saunders*, 12 Wheat. 213, Chief Justice Marshall, concerning the principles of construction which ought to be applied to the Constitution of the United States, said (p. 332):

> To say, that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into in-

> significance, nor extended to objects not comprehended in them, nor contemplated by its framers—is to repeat what has been already said more at large, and is all that can be necessary.

Story on the Constitution (5th ed.), Vol. I, Sec. 405:

> Where its words are plain, clear, and determinate, they require no interpretation. * * * Where the words admit of two senses each of which is conformable to common usage, that sense is to be adopted which, without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design, of the instrument.

In *Lake County* v. *Rollins*, 130 U. S. 662, construing the Constitution of the State of Colorado, Mr. Justice Lamar, writing for this Court, said (p. 670):

> To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural significance of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it.

In *Boyd* v. *United States*, *supra*, the Court said that the judgment of Lord Camden in *Entick* v. *Carrington* might be considered as sufficiently explanatory of what was meant by unreasonable searches and seizures, and Chief Justice Taft in the *Carroll case* has already been quoted as saying that the Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted.

This Court has frequently said that the Fourth and Fifth Amendments should be construed liberally, but it is submitted that by no liberality of construction can a conversation passing over a telephone wire become a "house," no more can it become a "person," a "paper," or an "effect." "Effects" is the least definite of the four words. This Court has said of "effects" that—

> when the word is used alone, or *simpliciter*, it means all kinds of personal estate * * *. But if there be some word used with it, restraining its meaning, then it is governed by that, or means something *ejusdem generis*. [*Planters Bank* v. *Sharp*, 6 How. 301, 321.]

Giving to the word its literal import, the sense in which it is generally understood, its natural significance taken in connection with the context in which it appears, it does not seem possible to include within its meaning anything other than tangible personal property or to extend it to include a telephone conversation or any intangible

right of privacy of the parties with respect to such conversation.

Tapping a telephone wire running to a business office at a point in the office building outside of the office it serves does not involve a search or seizure of persons or houses nor of papers or effects of the subscriber. Tapping a residence telephone line at a point on the public highway, or at any point outside the dwelling, does not involve a search or seizure of persons, or of papers and effects of the subscriber, nor does it involve a search of a house, unless the telephone wire belonging to the telephone company at all points between the company's switchboard and the dwelling it serves is considered a part of the dwelling.

GENERAL CONSIDERATIONS AND CONCLUSION

Petitioners are urging the extension of the Fourth Amendment into a new field, the limits of which are difficult to define. If evidence obtained by tapping telephone wires at points not in private dwellings is excluded on constitutional grounds, on the same principle would not all manner of evidence gathered by ruse or entrapment have to be excluded? Suppose an officer obtains access to a telephone on a party line and listens to incriminating conversations of other parties having telephones on the line; suppose instead of tapping a wire he goes to the telephone exchange and with or without permission of the operator plugs in on a private

line and listens; suppose he leases an office and puts a dictaphone in the wall of the adjoining office and listens; suppose without trespassing he is able to put his ear to the keyhole of the door of an office or house and listens; suppose he pretends to join a conspiracy and thereby gains access to the inner councils of the conspirators and hears the hatching of their criminal schemes. These examples, varying into slight shades of distinction, might be multiplied indefinitely to show the extremes to which the principle contended for would lead. Once cut loose from the fair literal import of the language of the amendment, and there is no place to anchor.

In the construction of the Amendment a balance should be sought between that which will preserve the fundamental safeguard which the Amendment was designed to secure and at the same time not unduly fetter the arm of the Government in the enforcement of law. The practical aspect of the problem is expressed with a good deal of force by the Supreme Court of California in *People* v. *Mayen*, 188 Cal. 237, as follows (p. 251):

> The constitution and laws of the land are not solicitous to aid persons charged with crime in their efforts to conceal or sequester evidence of their iniquity. From the necessity of the case the law countenances many devious methods of procuring evidence in criminal cases. The whole system of espionage rests largely upon deceiving and trapping the wrongdoer into some involun-

> tary disclosure of his crime. It dissimulates a way into his confidence; it listens at the keyhole and peers through the transom light. It is not nice, but it is necessary in ferreting out the crimes against society which are always done in darkness and concealment.

Even if the principle contended for by petitioners were accepted, the extent of its application in this case would be questionable. Two of the petitioners apparently did not participate in any conversation testified to upon the trial. The house taps were confined to three of the petitioners. Most of the conversations in question came from the office in the Henry Building. What right of privacy did the various petitioners have with respect to that office? The evidence does not show in whom the leasehold right was vested. It shows vaguely that six of the petitioners had a proprietary interest in the liquor business there conducted. The other thirteen, so far as can be deduced from the record, appear to be merely salaried employes. They had no personal interest in the office or its use. Their telephone conversations were in furtherance of their employer's business. Were their "persons, papers or effects" searched by the unauthorized listening to such conversations? It would be interesting to know just what the petitioners claim was searched. Certainly not their "papers." Was it their "persons," their "houses," or their "effects"? What was seized?

The telephone conversations were overheard, but they were not intercepted nor interfered with and a conversation may hardly be said to be "seized."

We are not defending wire tapping as a method proper generally to be used for detection of crime, although cases may be imagined where wire tapping would not arouse any resentment among good people. The Prohibition Unit of the Treasury disclaims it and the Department of Justice has frowned on it. No other recent case in the Federal courts has come to our attention in which officers of the United States have resorted to it. The question here is not one of governmental or departmental policy, but of constitutional law.

If, in any circumstances, obtaining evidence by tapping wires is deemed an objectionable governmental practice, it may be regulated or forbidden by statute, or avoided by officers of the law, but clearly the Constitution does not forbid it unless it involves actual unlawful entry into a house.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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